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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,
*Petitioner,*

v.

WEST HIGH SCHOOL, *et al.*,
*Respondents.*

## BRIEF OF RESPONDENT-INTERVENORS LEILA QUINONES BARELA, *ET AL.*, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iv

COUNTERSTATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE PETITION ..... 3

I. The Procedural Posture of the Petition is More Complex Than Petitioner Acknowledges ..... 4

A. The District Court Did Not Dismiss Petitioner's Complaint "At the Pleading Stage" ..... 4

B. There Are Alternative Grounds For Affirmance of the Court of Appeals' Decision That Complicate the Procedural Posture of the Petition ..... 6

II. The Court of Appeals' Holding Does Not Conflict With This Court's Decision In *Crawford-El* ..... 8

III. The Court of Appeals' Holding Does Not Conflict with Other Courts of Appeals ..... 9

IV. The Court of Appeals' Holding Makes Good Sense ..... 11

CONCLUSION ..... 13

## TABLE OF AUTHORITIES

CASES

*A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966) . . . . . 4

*Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) . . . . . 7

*Bauchman v. West High School*, 900 F. Supp. 248 (D. Utah 1995) . . . . . 2

*Bauchman v. West High School*, No. 95-C-506G, 1996 WL 407856 (D. Utah May 30, 1996) . . . *passim*

*Bauchman v. West High School*, 132 F.2d 542 (10th Cir. 1995) . . . . . *passim*

*Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373 (9th Cir. 1994) . . . . . 12

*Crawford-El v. Britton*, No. 96-827, 1998 WL 213193 (U.S. May 4, 1998) . . . . . 8, 9

*Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680 (7th Cir. 1994) . . . . . 11, 12

*Gates v. Unified School Dist.*, 996 F.2d 1035 (1993) . . . . . 7

*Gilles v. United States*, 906 F.2d 1386 (10th Cir. 1990) . . . . . 5

*Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985) ..... 11, 12

*Leatherman v. Tarrant County*, 507 U.S. 163 (1993) ..... 8

*Lee v. Weisman*, 505 U.S. 577 (1992) ..... 12

*Miller v. California*, 413 U.S. 15 (1973) ..... 4

*Monell v. Department of Social Services*, 436 U.S. 658 (1977) ..... 2, 7, 8

*Mozert v. Hawkins County Bd. Of Educ.*, 827 F.2d 1058 (6th Cir. 1987) ..... 12

*Siegent v. Gilley*, 500 U.S. 226 (1991) ..... 8

*Smith v. Board of School Comm'rs of Mobile County*, 827 F.2d 684 (11th Cir. 1987) ..... 12

*West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) ..... 5

STATUTES

UTAH CODE ANN. § 53-A-13-101.2 ..... 5

UTAH ADMIN. CODE R. 277-105-5 ..... 5

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This brief is submitted on behalf of respondents Leila Quinones Barela, *et al.*, defendant-intervenors below, in opposition to the petition for a writ of certiorari.

## COUNTERSTATEMENT OF THE CASE

Petitioner omits several critical facts from her Statement of the Case. First, petitioner fails to note that the Court of Appeals found most of this case to be moot. Defendant-Intervenors filed a Suggestion of Mootness with the Court of Appeals on June 20, 1997, bringing to the Court's attention that petitioner—the only plaintiff in the case—had transferred to a private high

school, Rowland Hall-St. Mark's, for the 1996-1997 school year and had graduated on June 7, 1997. In response, the Court of Appeals held that petitioner's graduation mooted her claims for declaratory and injunctive relief. (A10-12.) Thus, all that is left of this case is petitioner's claim for monetary damages—as to which petitioner omits three alternative grounds for affirmance.

First, the district court found that all of the individual defendants were protected by the doctrine of qualified immunity. (A108-109.) *See also Bauchman v. West High School*, 900 F. Supp. 248, 264-65 (D. Utah 1995)—which petitioner has omitted from her Appendix. Second, it found Mr. Torgerson's supervisors protected by the Tenth Circuit's doctrine of Supervisory Liability, because petitioner had not adequately pled an "affirmative link" between Mr. Torgerson's alleged conduct and acts or gross negligence of his superiors. (A107-108); *Bauchman*, 900 F. Supp. at 264. Third, the district court found the high school (and, apparently, the school district) protected under *Monell v. Department of Social Services*, 436 U.S. 658 (1977). *Bauchman*, 900 F. Supp. at 263-64.[1]

All of these arguments for affirmance were presented to the Court of Appeals. Brief of District Appellees at 36-45. *Cf.* A77 n.13 (Murphy, J., dissenting) (" it is neither necessary nor appropriate for this separate opinion to address the remaining multitude of alternative dispositive issues addressed by the parties on appeal."). They are important because, taken together, they would dispose of this entire case, the prospective

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[1]Despite captioning this case "*Bauchman v. West High School*," petitioner did not appeal the district court's dismissal of her claims against the high school itself, but only the dismissal of her claims against the school district and the individual defendants. A10 n.5.

claims as well as the damage claims, against all defendants.[2]

Finally, petitioner also omits mention of respondent-interveners' arguments below. Respondent-intervenors are members of the West High School *a capella* choir and their parents. They intervened in the district court in order to defend their interests in learning and performing a rich and varied repertoire. Respondent-Intervenors believe that the unsurprising presence of sacred music among the selections in the repertoire does not offend the Establishment Clause; indeed, we have argued throughout the proceedings below (and will argue here if plenary review is granted) that the Establishment and Free Speech Clauses forbid the systematic exclusion of music with religious themes or texts that petitioner seeks. *See, e.g.*, Appellate Brief of Defendant-Intervenors-Appellees at 23-32.

## REASONS FOR DENYING THE PETITION

The petition is not all that it seems. The first question presented makes it appear as if the Court of Appeals had held that a plaintiff in an Establishment Clause case "must allege an express and contemporaneous admission by a state actor that the challenged conduct was intended as an endorsement of religion." Pet. at (i). That is not the case. The second question presented makes it seem as if the Court of Appeals had dismissed the plaintiffs's amended complaint without construing it "in the light most favorable" to her. *Ibid.* That, too, is not the case. Moreover, as noted above, petitioner fails to inform the Court that her claims for prospective relief are now moot, and that her

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[2]The district court likewise would have denied petitioner's motion for leave to amend based on timeliness. *See* A42-43; A106-107.

damage claims are subject to other defenses. In short, as the Court of Appeals noted in another context, petitioner's argument "seems disingenuous." (A42.)

What is more, at the end of this long, twisted road lies a morass—judicial monitoring of the curriculum choices of public schoolteachers. Petitioner invites the Court in but offers little suggestion of how the Court should find its way through.

Respondents, who are choir members and their parents, are particularly alarmed at the prospect that their ability to interpret the full choral canon may be severely limited by judicial management of their choir's curricular and artistic decisions. Trying to sort out art and obscenity has proven difficult enough. *Compare A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*, 383 U.S. 413 (1966), *with Miller v. California*, 413 U.S. 15 (1973). Respondents shudder to think of the task of sorting out art and religion.

## I. The Procedural Posture of the Petition is More Complex Than Petitioner Acknowledges

### A. The District Court Did Not Dismiss Petitioner's Complaint "At the Pleading Stage"

The petition makes it sound as if the District Court had improperly dismissed petitioner's amended complaint. *See* Pet. at 17 ("Because a court is not permitted to dismiss a complaint simply because it does not believe the plaintiff's allegations . . . the Tenth Circuit erred in upholding the district court's failure to construe Rachel's allegations in her favor."). That is not what happened. Rather, the District Court dismissed petitioner's original complaint, which alleged in essence that the choir was singing some religious music and performing in some

religious venues, that petitioner had been given the option (in accordance with *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) and Utah law)[3] of not participating in matters that violated her conscience and still receiving an "A" for the course, and that petitioner suffered ridicule when she chose not to opt out but instead to demand a change in the curriculum.[4] *See* 10th Circuit Appendix at 4-10.

Following the dismissal of her original complaint, petitioner proffered a proposed amended complaint, together with a motion for leave to file it. The proposed amended complaint added largely conclusory allegations about defendants' purpose and numerous factual allegations about prior years, before Ms. Bauchman was a student in the class, or in the high school itself, or in at least one case, had even been born. *See* 10th Circuit Appendix at 150-205; 158.

The district court postponed consideration of the motion for leave to amend until after discovery could be taken into whether Ms. Bauchman had herself suffered any injury of constitutional dimension. Taking discovery on the question of futility of amendment is not a novel procedure in the Tenth Circuit. *See, e.g., Gilles v. United States*, 906 F.2d 1386, 1391 (10th Cir. 1990) (*en banc*) (remanding for reconsideration of motion for leave to amend "after discovery develops the facts and when the possibility of a claim . . . may be evaluated").

Moreover, in this particular case the district court was amply

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[3]*See* UTAH CODE ANN. § 53-A-13-101.2; UTAH ADMIN. CODE R. 277-105-5.

[4]Petitioner also alleged that she "was rebuffed" (she did not say by whom) when she inquired about an abortive spring choral trip that was being organized by choir members and their parents. 10th Circuit Appendix at 11.

justified in wanting to see petitioner's evidence prior to authorizing full-blown discovery into her teacher's entire career. *See, e.g.*, 10th Circuit Appendix at 443 (plaintiff's counsel apologizing for placing quotation marks in brief around what were merely "fair summary phrases"). And when put to her proof, petitioner's case was indeed less than met the eye. For example, petitioner's only witness for her allegation that Mr. Torgerson said, "I bring religion into the classroom, and I ask my students to do the same" turned out to be her mother—who ended up testifying that Mr. Torgerson actually had said something quite different: "I don't believe in leaving my religion at home and ask my students not to do the same." (A91.)[5]

In sum, the district court did not even dismiss petitioner's amended complaint, much less do so without construing it in her favor. Rather, the district court permitted discovery on the essential elements of her proposed amended complaint and then held filing it to be futile since it would still be dismissed and, in any event, could not survive summary judgment. (A106.) The Court of Appeals properly held that that was not an abuse of discretion.

### B. There Are Alternative Grounds For Affirmance of the Court of Appeals' Decision That Complicate the Procedural Posture of the Petition

There are important alternative bases for affirmance. The district court held that petitioner's "claim for damages as to all defendants . . . is barred by the qualified immunity doctrine."

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[5]Petitioner's ways have not changed. Despite being reminded of this discrepancy in the Court of Appeals (Brief for Defendant-Intervenors-Appellees at 39), petitioner persists in her misquote in this Court. *See* Pet. at 4.

(A109). For its rationale, the district court referred, (A108 n.80), to its earlier opinion dismissing the original complaint. That opinion is reported at 900 F. Supp. 254, 264-65 (D. Utah 1995). The argument for affirmance based on qualified immunity was presented to the Court of Appeals. Brief of District Appellees at 44-45. Also briefed to the Court of Appeals, *id.* at 36-43, were the issues of the restrictions on the liability for damages of the school district under *Monell v. Department of Social Services*, 436 U.S. 658 (1977), and the restrictions on damages based on supervisory liability claims in the Tenth Circuit under *Gates v. Unified School Dist.*, 996 F.2d 1035, 1041 (1993). Brief of District Appellees at 36-45; *Cf.* A77 n.13 (Murphy, J., dissenting) (noting "the remaining multitude of alternative dispositive issues addressed by the parties on appeal.").

The doctrine of qualified immunity and these other doctrines restricting damage claims are important here because damage claims are all that remain. The Court of Appeals held that all of petitioner's claims for prospective and declaratory relief became moot when petitioner graduated from high school in June, 1997.[6] (A10-12.) That holding is undoubtedly correct. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (action by state employee mooted on appeal when employee left her job).

Thus, the petition comes to this Court in a very complicated posture. The true question presented is whether the district court abused its discretion in declining leave to file proposed amended damage claims, against defendants protected by qualified immunity and other doctrines, after discovery revealed

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[6]Indeed, petitioner's prospective claims probably became moot even earlier, in August, 1996, when petitioner chose to transfer from West High School to a private school, Rowland Hall-St. Mark's.

that those damage claims would (a) be dismissed, (b) be subject to summary judgment and (c) be barred by the doctrine of qualified immunity, the Tenth Circuit law of supervisory liability, and this Court's *Monell* decision.[7]

## II. The Court of Appeals' Decision Does Not Conflict With This Court's Decision In *Crawford-El*

Petitioner has filed a supplemental brief calling this Court's attention to its recent 5-4 decision in *Crawford-El v. Britton*, 66 USLW 4311, 1998 WL 213193 (No. 96-827, May 4, 1998). That case does not control the outcome of this petition.

In *Crawford-El*, the Court of Appeals had "change[d] the burden of proof for an entire category of claims." *Id.* at *11. It had announced a rule requiring clear and convincing evidence for all "cases alleging unconstitutional motive." *Id.* at *12. This Court reversed, finding the D.C. Circuit's decision an unwarranted judicial amendment of the Federal Rules. *See also Leatherman v. Tarrant County*, 507 U.S. 163 (1993).

Nevertheless, in *Crawford-El*, this Court stressed that district courts retain the ability to manage unwarranted discovery into government officials' lives. For example, the Court noted, a district "court may . . . grant the defendant's motion for a more definite statement under Rule 12(e)," and "insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive." *Id.* at *14 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in

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[7]The district court also stated, as an alternative basis for its holding, that the motion for leave to amend, which followed briefing, argument and a published opinion, was untimely. The Court of Appeals questioned that holding, but did not reach it. (A42-43.)

judgment)). Likewise, "the court may postpone all inquiry regarding the official's subjective motive until discovery has been had on objective factual questions such as whether the plaintiff suffered any injury . . . ." *Crawford-El* at *15.

The course of action taken by the district court here, which the Court of Appeals affirmed, is not dissimilar. The district court, noting only conclusory allegations of motives in the proposed amended complaint, ordered discovery into whether there was any factual basis for petitioner's claim. And when discovery revealed there was not, the court properly found that it would be futile to allow filing of that complaint. A105-106; A34-42.

Moreover, unlike in *Crawford-El*, the Court of Appeals here has announced no broad rule encompassing large numbers and types of cases, and most importantly, has not changed the burden of proof. Rather its stated reasons for its limited "focus . . . on concrete manifestation of intent" (A39) center on the peculiar circumstances of challenges to "public school curricula decisions." (A40.) Indeed, the Court of Appeals emphasized this was an unusual case, adding that the task of constitutional analysis "is perhaps more appropriately undertaken on summary judgment or after trial" (A43), though in this case the district court's actions were warranted. *Id.*

## III. The Court of Appeals' Holding Does Not Conflict with Other Courts of Appeals

In her first question presented, and repeatedly throughout the petition, petitioner says that the Court of Appeals held that a successful Establishment Clause plaintiff "must allege an express and contemporaneous *admission* by a state actor that the challenged conduct was intended as an endorsement of religion."

Pet. at (i) (emphasis added). *See also id.* at 7 ("requirement of contemporaneous, express admission"); *id.* at 15 (alleging circuit split over question of "express, contemporaneous admissions"); *id.* at 16 ("express contemporaneous statements").

Lest there be any doubt, petitioner charges that "the court below bars all indirect evidence of intent." *Id.* at 11. And again, petitioner alleges, "short of a statement at the time by the actor that 'my purpose is to promote religion'—virtually no allegation will suffice." *Ibid.* Thus, petitioner spends four pages demonstrating that other Courts of Appeals, in alleged contradistinction with the lower court here, consider indirect evidence of intent. *Id.* at 14-17. The Court of Appeals in this case is then said to have done something "inconsistent with centuries of Anglo-Saxon jurisprudence." *Id.* at 12. Indeed, petitioner even accuses the lower court of doing something "unique[] in the history of judicial analysis . . . ." *Id.* at 11.

The Court of Appeals' actual holding is much less historic. The court simply held that Establishment Clause challenges to the inclusion of religious art in public school curricula cannot rest on conclusory allegations of an improper purpose. Rather, claims of this sort "must be supported by allegations of *conduct* or statements" that objectively indicate an improper purpose. (A40) (emphasis added). These allegations must not "resort[] to psychoanalysis," but cite "*conduct* or statements" "expressly . . . indicat[ing]" that the defendant had an improper purpose. *Ibid* (emphasis added). In short, indirect evidence is welcome. But *some* evidence, indirect or otherwise, must be pled.

There is thus no split at all in the circuits. The other Courts of Appeals accept circumstantial evidence of governmental purpose. Pet. at 14-17. And so does the Court of Appeals in this case. It merely requires at least some alleged

facts—"conduct or statements"—that tend to demonstrate that intent.

## IV. The Court of Appeals' Holding Makes Good Sense

The lower court's holding is entirely reasonable. Indeed, a different rule would invites chaos. Anytime a public school student alleged that a curriculum decision he or she found offensive was the product of hidden religious purpose that decision could become the subject of litigation in federal court—complete with searching discovery into the teacher's personal religious life and his or her entire career.

Suppose, for example, an astronomy teacher who is a New Age adherent required her students to chart the phases of the moon. Or suppose a literature teacher who was Jewish assigned his class the novels of Chaim Potok, or a drama teacher who was Catholic chose to produce *Les Miserables*. Petitioner's theory would permit any student who was offended by these curricular choices to file a federal lawsuit and take discovery into his or her teacher's religious beliefs and practices, as well as into the teacher's employment history, merely on the allegation that the teacher was attempting to advance a particular religion.

These scenarios are not fanciful. The lower federal courts have already faced similar cases. In *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985), the plaintiff mounted an unsuccessful Establishment Clause challenge to including the book *The Learning Tree* in a sophomore literature class. The plaintiff alleged among other things that the book denigrated Christianity and advanced "secular humanism" in violation of the Establishment Clause. In *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680 (7th Cir. 1994), parents of public primary

school students made a similar Establishment Clause challenge to portions of the reading curriculum. Both cases were dismissed, under 12(b)(6) motions treated as motions for summary judgment. *Grove*, 753 F.2d at 1532-33; *Fleischfresser*, 15 F.3d at 684-85. *See also Brown v. Woodland Joint Unified School Dist.*, 27 F.3d 1373 (9th Cir. 1994) (Establishment Clause challenge to reading curriculum allegedly promoting witchcraft); *Smith v. Board of School Comm'rs of Mobile County*, 827 F.2d 684 (11th Cir. 1987) (Establishment Clause challenge to various textbooks); *Mozert v. Hawkins County Bd. Of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (same).

There is no question that the plaintiffs in all those cases were sincere. There is likewise no doubt that there are countless other potential plaintiffs just like them. As this Court has noted, "[p]eople may take offense at all manner of religious as well as nonreligious messages." *Lee v. Weisman*, 505 U.S. 577, 597 (1992).[8] If all that were required to obtain discovery and perhaps proceed to trial were a combination of personal offense taken plus an allegation of improper purpose there would be no end to curriculum challenges. As Judge O'Scannlain wrote for the court in *Brown*, "If an Establishment Clause violation arose each time a student believed that a school practice either advanced or disapproved of a religion, school curricula would be reduced to the lowest common denominator, permitting each student to become a 'curriculum review committee' unto himself or herself." 27 F.3d at 1379.

Respondents agree that the Establishment Clause is in need of clarification. We respectfully disagree, however, that a

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[8]The Court pointedly added that "offense alone does not in every case show a violation." *Ibid.*

procedurally complex case about the role of religious music in an arts curriculum is a promising place to begin.

## CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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